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No. 94-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(a), conferring jurisdiction over final judgments of the highest state court in which review could be had, where the judgment of the Supreme Court of Illinois anticipates further proceedings below that may affect the nature of the constitutional questions presented?

2. Does the State violate the due process rights of a recipient of mental health services when it establishes a statutory scheme providing for judicial authorization of the involuntary administration of psychotropic medication, if specified criteria are established by clear and convincing evidence?

3. Is the equal protection clause even implicated where a uniform statutory scheme governs procedures that must be followed in all instances before a recipient of services must submit to the involuntary administration of psychotropic medication?

LIST OF PARTIES

Petitioner C.E., an adult male, is a recipient of mental health services. He is the subject of petitions filed by his father, L.E., also a petitioner herein, which *inter alia* sought an appointment as C.E.'s plenary guardian and an order authorizing the administration of psychotropic medication to C.E. L.E. had previously served as C.E.'s temporary guardian by an appointment under the Illinois Probate Act of 1975.

The Respondent Illinois Department of Mental Health and Developmental Disabilities is the State agency charged with administering the Mental Health and Developmental Disabilities Code. 405 ILCS 5/2-100 *et seq.* (West 1992). The Department intervened in the Circuit Court of Cook County to defend the constitutionality of section 2-107.1 of the Code. 405 ILCS 5/2-107.1 (West 1992).

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Supreme Court of Illinois entered its judgment on May 19, 1994. (App. A-1) C.E. timely filed a petition for rehearing, which the court denied on October 3, 1994. (App. C-1) The Petition was filed in this Court on December 30, 1994. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). Respondent maintains, however, that there is no final judgment as required to confer jurisdiction under that provision.

STATEMENT OF THE CASE

The Challenged Provision

a. History of Section 2-107.1

In 1989, then-Governor Thompson appointed a Commission to Revise the Mental Health and Developmental Disabilities ("MHDD") Code. The Governor charged the Commission, comprised of experts in the mental health field, with the task of suggesting changes to the MHDD Code and related laws with respect to certain issues, including the right to refuse treatment and informed consent. The Commission proposed, among other things, that legislative standards be established for the involuntary administration of psychotropic medications to mentally ill or developmentally disabled recipients of services who lack the capacity to make reasoned decisions about such medications. (R. C61-62, 64-65)

The Commission found serious flaws in the then-existing system. (R. C61) With respect to the emergency medication provisions of section 2-107, 405 ILCS 5/2-107 (West 1992), the Commission noted that the lack of specificity in that section allowed hospitals to impose medication involuntarily in situations that were not true emergencies. (R. C61) It also noted that the lack of specificity led some facilities to decline to medicate patients, even where warranted, for fear of liability. (R. C61)

The Commission further found that "there are circumstances under which medication should be imposed that cannot be characterized as emergencies." (R. C64) The Commission observed:

> Perhaps most significant was the evidence received by the Commission that many patients who need and would benefit from treatment are not receiving that treatment because, due to their illness, they do not

> recognize their need for medication and are unable to make a reasoned decision concerning this important matter.

(R. C62)

Finally, the Commission found serious shortcomings in the guardianship procedures then being used to secure the involuntary administration of medication in non-emergency situations. For example, the Commission noted that many disabled adults did not have guardians appointed and did not have a close relative or friend who could serve in that capacity. The Office of the State Guardian, moreover, did not have the resources to assume responsibility for an entirely new group of clients. (R. C62)

More fundamentally, the Commission viewed the guardianship system to be "ill suited to the task" of addressing the more limited area of treatment and medication decisions. (R. C62) Many mental health patients are not "incompetent," in the sense of lacking decision-making capacity for all purposes and for extended periods of time. Some patients lack the capacity only to make some decisions, and some are incapable of making decisions only for short periods of time. Yet, under the guardianship system, the guardian is given plenary authority over matters concerning the ward, and sometimes the guardianship is not terminated even when the patient improves. Appointing a guardian for these persons, even assuming an appointment would be permissible, substantially reduces their autonomy. (R. C62)

Additionally, the Commission found that the guardianship procedures often did not accord the patient sufficient protection, because he was usually not present and not represented by counsel. Even in emergency circumstances, it usually took one month from the time of filing the peti-

tion to the appointment. (R. C62) The Commission recommended amendments to the MHDD Code to address the flaws in the system pertaining to the administration of psychotropic medication.

b. The Framework of Section 2-107.1

The Illinois legislature responded by enacting 2-107.1. Under section 2-107.1, psychotropic medication may only be administered to a "recipient of services" against his will under the standards and procedures specified therein. *See* 405 ILCS 5/2-107.1 (West 1992). A "recipient of services" includes both mentally ill and developmentally disabled persons. *See* 405 ILCS 5/1-111, 5/1-123, 5/1-128 (West 1992). Moreover, the standards and procedures outlined in that section must be followed, regardless of whether or not a guardian has been appointed. P.A. 89-11, § 5, *amending,* 405 ILCS 5/2-107.1(g). (Resp. App. A-2)*

The non-emergency, involuntary administration of psychotropic medication may be accomplished only by an order of the court after a showing, by clear and convincing evidence, that six criteria are met:

> (1) That the recipient has a serious mental illness or developmental disability.
>
> (2) That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.
>
> (3) That the illness or disability has existed for a period marked by the continuing presence of the

---

* Section 2-107.1 was amended effective March 31, 1995. *See* p. 6 *infra.* A copy of the amended statute is reprinted in the appendix to this Brief. To avoid confusion, citation is made to the codified statute, unless the reference is to a substantive change.

> symptoms set forth in paragraph (2) of subsection (d) of this Section or the repeated episodic occurrence of these symptoms.
>
> (4) That the benefits of the psychotropic medication will outweigh the harm.
>
> (5) That the recipient lacks the capacity to make a reasoned decision about the medication.
>
> (6) That other less restrictive services have been explored and found inappropriate.

405 ILCS 5/2-107.1(d).

If all of these factors are established by the requisite evidence, a court may order the administration of psychotropic medication. The order must designate the persons authorized to administer the psychotropic medication, 405 ILCS 5/2-107.1(f), and it may "in no event" be effective for more than 90 days. 405 ILCS 5/2-107.1(e). A court may order medication for additional 90-day periods, but only pursuant to subsequent hearings that comply with the standards and procedures of section 2-107.1 *Id.*

The proceedings are initiated by filing a petition, which must be filed with the circuit court by someone at least 18 years of age. It may be filed by a guardian. 405 ILCS 5/2-107.1(a). A guardian may not, however, consent to the administration of psychotropic medication over the objection of the ward other than under the standards and procedures of section 2-107.1. P.A. 89-11, § 5, *amending*, 405 ILCS 5/2-107.1. (Resp. App. A-2) A hearing on the petition must be held within 30 days. 405 ILCS 5/2-107.1(b).

The six factors in section 2-107.1 were recommended by the Governor's Commission to be used to determine whether to provide services in the absence of consent. The section also provides certain safeguards not found in the Commission's recommendations: (1) it limits section 2-107.1 to psychotropic medications; (2) it requires application of

a clear and convincing burden of proof; (3) it ensures against the application of conflicting standards under the Probate Act by making it the exclusive means for obtaining orders for the involuntary administration of psychotropic medications; and (4) it provides rigorous procedural protections by incorporating those contained in chapter 3, article VIII of the MHDD Code. *See* 405 ILCS 5/2-107.1.

On March 31, 1995, the General Assembly amended section 2-107.1. The amendment clarifies that a guardian may consent to the administration of psychotropic medication to a non-objecting recipient, P.A. 89-11, § 5 (Resp. App. A-3), and that a guardian may only consent to the administration of such medication "to an objecting recipient" if the standards and procedures of section 2-107.1 are followed. P.A. 89-11, § 5. (Resp. App. A-2) The amendment also renumbers some of the subsections of the Act.*

---

* Currently, another amendment to the statute is pending in the Illinois General Assembly. Senate Bill No. 1048. This amendment would revise various provisions of the MHDD Code concerning the administration of psychotropic medications, including section 2-107.1.

The amendment limits the circumstances and duration of the administration of such medications in emergency situations. It adds a provision to section 2-107.1, requiring notification of the hearing to the respondent and the guardian and provides for court approval of certain tests before medication is administered. The amendment shortens the time from 30 to 14 days from filing the petition to hearing. It requires the court to determine that testing is essential for the safe administration of the medication, when such testing is requested. Under the amendment, medication may continue after 90 days, if a new petition is filed 15 days before the order is to expire and the recipient agrees to a continuance of the hearing. Finally, the person designated by the court order to administer the medication "shall have complete discretion not to administer any medication authorized under this Section." S.B. 1048, § 5, which would amend 405 ILCS 5/2-107(f).

In enacting section 2-107.1, the General Assembly determined that the decision whether to involuntarily administer psychotropic medication to mentally ill or developmentally disabled individuals who lack the capacity to make reasoned decisions concerning such medication should be made by a court pursuant to a clear and convincing standard of proof, rather than by a guardian or family member. In so doing, the General Assembly elected to place the risk of an erroneous determination on the party seeking the order to medicate, rather than on the individual refusing the medication. The General Assembly also determined that such medication may only be ordered for 90 days at a time. This requirement ensures that monitoring will occur to avoid the serious side effects which typically do not occur unless such medication is utilized continuously or regularly for extended periods of time. Thus, section 2-107.1 reflects both the General Assembly's recognition of the well-documented therapeutic benefits of psychotropic medications, and its sensitivity to the potentially serious side effects of such medications.

The Opinion of the Illinois Supreme Court

In this facial challenge, the Petitioners acknowledge that the Illinois Supreme Court found that section 2-107.1 "permits the court's consideration of the substituted judgment standard" (App. A-19), and that the patient's "wishes, when competent, will often by [sic] very relevant to a determination of whether psychotropic substances should be administered." (App. A-21) (Petition at 10) The court also made clear its expectation that, in section 2-107.1 proceedings, the circuit court must give consideration to the " 'substituted judgment' of the mental health recipient" (App. A-19) and that the court must "respect the wishes expressed by the mental health patient when the patient was capable of making rational treatment decisions." (*Id.*)

At the same time, the court recognized that, as the statute is applied in myriad contexts to mentally ill or developmentally disabled persons, circumstances may arise when the substituted judgment standard " 'converts into a legal fiction' " because ascertaining the wishes of such persons is simply impossible. (App. A-19 (quoting Chicon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 392 (1992).) In those instances, when the patient's "wishes have not been clearly proven, . . . the court should be guided by an objective standard of reasonableness, as shown by the evidence presented." (App. A-19; *see also* App. A-21) The court considered this "hybrid" standard (App. A-20) most suitable to "preserve the integrity of the mental health patient while respecting the health care professional's duty to treat the patient." (App. A-19)

With respect to the equal protection analysis, the court's pronouncement that the court may appoint a guardian or a guardian *ad litem* in section 2-107.1 proceedings constitutes only a portion of the court's decision on that claim. (Petition at 10-11) The court also concluded that even the limited or temporary guardian must comply with section 2-107.1's requirements. (App. A-31)

Because the court was faced with a facial challenge to section 2-107.1, and because the circuit court had not ruled on L.E.'s petition or applied the statute's factors to C.E.'s circumstances, it remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION UNDER SECTION 1257(a) BECAUSE THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS IS NOT FINAL.

Finality as a condition precedent to review is an historic characteristic of the Court's jurisdiction over state litigation. *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 67 (1948) (noting that Congress has limited the Court's power to review final judgments of the highest state court in which review could be had since 1789). The finality rule guards against unnecessary expense, delay and labor occasioned by successive appeals in the same case. *Id.*; *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945). As importantly, strict compliance with this rule avoids premature and inappropriate adjudications of constitutional issues. *Minnick v. California Department of Corrections,* 452 U.S. 105, 122 (1981). And in the context of review of state court judgments, the finality requirement is nothing less than "an important factor in the smooth working of our federal system," *Radio Station WOW,* 326 U.S. at 124, since the Court's jurisdiction is invoked "in the realm of potential conflict between the courts of two different governments." *Id.* Thus, the party seeking review "has the burden of affirmatively establishing this Court's jurisdiction," *Republic Natural Gas,* 334 U.S. at 70-71, with any doubts resolved against its exercise. *Id.*

Ordinarily, a judgment is not considered final until the rights of the parties are fully determined and there is nothing left to do except enter judgment. *See Gospel Army v. City of Los Angeles,* 331 U.S. 543, 546 (1947). Therefore, in most circumstances, the final judgment rule precludes review " 'where anything further remains to be

determined by a State court, no matter how dissociated from the only federal issue that has been finally adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW*, 326 U.S. at 124).

In this case, L.E. filed a petition for the involuntary administration of psychotropic medication under section 2-107.1, as well as a petition for declaratory judgment holding that provision unconstitutional. Since the circuit court invalidated the statute, it did not rule on L.E.'s petition or determine whether C.E. must submit to the administration of psychotropic medications. Those issues must be resolved on remand. Thus, the rights of the parties were not finally determined by the judgment, and the fact that the Illinois Supreme Court resolved some federal questions does not render its decision final for purposes of this Court's jurisdiction. *See Flynt*, 451 U.S. at 620-21; *Republic Natural Gas Co.*, 334 U.S. at 69-70.

While the Court has interpreted the finality requirement flexibly, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975), this case does not fall squarely within the two exceptions upon which Petitioners rely. (Petition at 11-12) Contrary to Petitioners' suggestion, federal question may still arise on remand. The Illinois Supreme Court's interpretation of section 2-107.1 presupposes that where evidence is available, the trial court must consider the preferences of the individual who is the subject of a petition under that section. (App. A-19–A-21) It thus incorporates, in appropriate cases, the constitutional standard urged by Petitioners. *See In re Jeffers*, 239 Ill. App. 3d 29, 606 N.E.2d 727, 730-31 (1992) (holding substituted judgment standard not required or applicable under section 2-107.1), *petition for leave to appeal allowed*, 158 Ill. 2d 570, 643 N.E.2d 839 (1994) (ordering reconsideration of

judgment in light of *In re C.E.*), *reaffirming decision on remand*, No. 4-93-0566 (Ill. App. Ct., order filed Apr. 6, 1995) (noting that supreme court's decision requires consideration of substituted judgment standard but finding no evidence showing what recipient's wishes were). Although the court resolved certain constitutional questions, further proceedings may give rise to others. In any event, because of the State court's interpretation of the statute, state law and constitutional questions are not neatly segregated. *See Minnick*, 452 U.S. at 122-26.

In *Flynt*, 451 U.S. at 621, the Court explained that "in most, if not all, of the cases" falling within *Cox*'s categories, "not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other issues to be resolved." Therefore, there was no likelihood of piecemeal review of the federal questions. Here, as in *Flynt*, where additional proceedings are contemplated that may give rise to, if not entirely new at least different, federal questions, review at this time provides no assurance that the litigation will not generate another appeal.

Moreover, Petitioners' unsupported assertion that the federal question will escape review at a later time is neither correct nor determinative of whether finality exists in this case. (Petition at 11-12) If the trial court wholly ignores C.E.'s wishes while competent, or concludes that no evidence shows what those wishes are, C.E. may still raise a federal question regarding the constitutionality of such a ruling on appeal. *See Jones v. Petrolane-Cigras, Inc.*, 186 Ill. App. 3d 1030, 542 N.E.2d 1186, 1188 (1989), *appeal denied*, 128 Ill. 2d 663, 548 N.E.2d 1069 (1989) (law of case on remand does not encompass issues not decided by reviewing court). The Illinois Supreme Court would be obliged to consider a challenge to the constitutional-

ity of the statute as applied on direct appeal, just as it was obliged to entertain on direct appeal the facial attack below. *See* Ill. Sup. Ct. R. 302(a); *see Catlett v. Novak*, 116 Ill. 2d 63, 506 N.E.2d 586, 587-89 (1987) (entertaining appeal from finding of unconstitutionality as applied under Rule 302(a)). Alternatively, even if direct review were not available, Petitioners could seek review in the Illinois Appellate Court and, after exhausting further appeals, could then again ask this Court to review the entire case. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982) (rejecting contention that law of case bars review of federal question after initial denial of certiorari since contrary interpretation would insulate interlocutory state court constitutional rulings from review). Thus, Petitioners have not shown that theirs falls in the category of cases where unique circumstances would prevent review at a later time. *E.g. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973) (state law prevents appeal by administrative agency of its own decision).

Accepting Petitioner's interpretation of *Cox*'s fourth exception, which would permit immediate review whenever a party could prevail on the merits on remand on state law grounds and make review of the federal question unnecessary, as in *Flynt*, would permit the exception "to swallow the rule." *Flynt*, 451 U.S. at 622. On remand, were the evidence to show that C.E. would have categorically refused such treatment when competent, perhaps the trial court would deny the request for involuntary administration of the medication. In that event, C.E.'s right of refusal, as well as this Court's preference to avoid constitutional adjudication, would be preserved. *See Minnick*, 452 U.S. at 122; *see also Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953) (citing possibility that later

proceedings will dispose of need for appeal as a rationale for finality rule).

Here, because federal questions are likely to arise during the course of further proceedings and a later appeal is available, "[t]he resolution of [the federal] question can await final judgment without any adverse effect upon important federal interests." *Flynt*, 451 U.S. at 622. Rejecting Petitioners' claim to jurisdiction here, when the development of facts will necessarily clarify and illuminate the constitutional interests at stake, is all the more justified. *See Minnick*, 452 U.S. at 122-23.

II.

EVEN IF THE JUDGMENT WERE FINAL UNDER SECTION 1257(a), REVIEW AT THIS TIME WOULD BE IMPROVIDENT BECAUSE THE RECORD, WHICH WILL BE DEVELOPED ON REMAND, DOES NOT CONTAIN FACTS CRITICAL FOR RESOLVING THE ISSUES.

The very factors that preclude jurisdiction—the intermingling of federal and state law questions and the lack of a factual record—also render inappropriate the exercise of this Court's discretion to allow review at this time. It has long been the policy of this Court to avoid "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., dissenting in part) (internal quotations omitted). This policy entails both constitutional and prudential limitations upon the exercise of federal court jurisdiction. *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 568-74 (1947). It is founded in concern that this Court has no power to issue advisory opinions, *Ashwander*, 297 U.S. at 345-46, and so the Court has insisted on "strict necessity in disposing of constitutional issues." *Rescue Army*, 331 U.S. at 568.

In this case, Petitioners seek a ruling that an individual's liberty interest *always* precludes the State from exercising its *parens patriae* powers to be able to administer psychotropic medication in non-emergency situations, regardless of the requirement of a court order, or of how the medication will benefit the recipient, or of what other treatment alternatives exist, except when, using the substituted judgment standard, evidence would show that the recipient would have consented to the treatment. Subsumed in this question are subsidiary issues, such as whether the individual's interest to refuse treatment must be deemed fundamental, what significance is to be given to the State's interest, and can the State's interest ever be found to outweigh the individual's interests. Petitioners ask this Court to resolve these weighty and intricate questions, moreover, in the context of a facial challenge to section 2-107.1. The total absence of facts in this record, the complexity of the issues, and the expectation that proceedings on remand may illuminate at least some of the factors to be considered make review at this time manifestly inappropriate.

In passing on the issues, this Court, as the Illinois court did, will have to take into account the various types of mental impairments and disabilities that might afflict the subjects of the petition under section 2-107.1 in setting a constitutional standard. Some of these persons, the severely mentally retarded for example, may never have had the capacity to reach a decision about their treatment. Others may have experienced long intervals of time in which they were fully capable of making rational treatment choices. The record contains no information about any of these groups or the differences between them.

Moreover, no facts were developed below concerning the nature or duration of the medications to be prescribed.

Importantly, while the Petition catalogues the dangers of psychotropic medication (Petition at 4-6), which the Illinois Supreme Court itself acknowledged (App. A-11–A-12), L.E., presumably acting in C.E.'s best interests, sought first as his temporary guardian and then in a section 2-107.1 petition to obtain such treatment for his son. (R. C2) Obviously, then, psychotropic medications also have curative and beneficial effects. *See* Brakel and Davis, *Taking Harms Seriously: Involving Mental Patients and the Right to Refuse Treatment*, 25 Ind. L. Rev. 429, 437 (1991). The resolution of factual matters pertaining to the type of medications, the duration of administering them, their salutary effects, and the effects on the recipient of not taking such medications would be critical in fully exploring all of the factors relevant to the due process questions presented.

The record in this case does not even reveal facts about C.E.'s history. Because the circuit court held the statute invalid on its face, the court did not consider evidence of C.E.'s wishes while competent, or even whether such evidence was available. These matters are likely to be explored on remand, since the Illinois Supreme Court required the circuit court to consider such evidence, if available, in passing upon section 2-107.1 petitions. (App. A-19–A-22) The Court would then have a factual context in which to examine the important and delicate constitutional concerns at issue. *See Gospel Army*, 331 U.S. at 548 ("[E]xperience demonstrates that particularly in constitutional cases issues turn upon factual presentation.")

In this regard, it is significant that in this facial challenge, no evidence has yet been presented on the specific type of medication that C.E. would be prescribed. Nor were there facts presented showing the benefits or risks

to C.E. if the medication is administered or withheld. No evidence helped the court assess whether other treatment had been "explored and found inappropriate." 405 ILCS 5/2-107.1(a)(6). A showing was not made as to how long C.E. would have taken, or would be required to take, the medication, or how effective the medication would be.

Evidence of this nature would be useful to the Court in weighing and evaluating whether, or in what circumstances, a substituted judgment standard would be constitutionally required. The context of the proceedings below—a declaratory judgment—accorded no opportunity for developing such a factual record, *see Rescue Army*, 331 U.S. at 574 (cautioning that "the greatest care" is required in the declaratory judgment setting to prevent premature constitutional adjudication), and the nature of a facial challenge necessarily required the court below, as it would this Court, to test the statute against myriad, hypothetical situations. (*See* App. A-8 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987), for the standard that the law must be upheld unless "no set of circumstances exists under which [it] would be valid."))

Since the questions to be resolved on remand mesh with the constitutional standard Petitioners seek, and since development of the facts will clarify and define the constitutional questions, review at this time is premature, even if the judgment is final. Therefore, on this basis alone, the Court should deny the petition.

III.

THE ILLINOIS SUPREME COURT CORRECTLY DETERMINED, IN THIS FACIAL CHALLENGE, THAT SECTION 2-107.1 DID NOT VIOLATE C.E.'S RIGHT TO DUE PROCESS, AND ITS DECISION IS PERFECTLY CONSISTENT WITH THIS COURT'S RULINGS.

The Illinois Supreme Court recognized, consistent with this Court's decisions, that "persons who are mentally ill or developmentally disabled have a Federal constitutionally protected liberty interest to refuse the administration of psychotropic drugs." (App. A-11) *See, e.g., Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990); *Washington v. Harper*, 494 U.S. 210, 221 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). It also determined, consistent with a number of federal and state court decisions, that "the state has a legitimate *parens patriae* interest in furthering the treatment of those who are mentally ill by forcibly administering psychotropic medication when the patient is not capable of making a sound decision in his own behalf." (App. A-14; *see also* App. A-14–A-15 and cases cited therein.) Consequently, in accordance with this Court's approach in *Cruzan*, *Washington* and *Youngberg*, the Illinois court found it "necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " (App. A-15 (quoting *Youngberg*, 457 U.S. at 320) (internal quotations omitted)); *Cruzan*, 497 U.S. at 279; *Washington*, 494 U.S. at 220.

In deciding where that balance was to be struck in the context of this facial challenge, the supreme court found specific features of section 2-107.1 particularly significant in reaching the conclusion that that provision did not, "on its face, impermissibly burden the Federal constitutional liberty interests of C.E." (App. A-17) First, section 2-107.1 was "narrowly tailored to specifically address the State's

concern for the well-being of those who are not able to make a rational choice regarding the administration of psychotropic medications." (App. A-15) It set forth precise standards that had to be established by clear and convincing evidence, identified the clinical disabilities that had to exist and provided a mechanism for when the medications could be administered against the will of the patient. (App. A-16)

Second, the statute permitted the involuntary administration of psychotropic medications in limited circumstances. The recipient had to be suffering from specified conditions, a " 'deterioration of his ability to function, suffering, or threatening or disruptive behavior.' " (App. A-16 (quoting 405 ILCS 5/2-107.1(d)(2)).) The conditions had to have been manifested for a defined period of time. (App. A-16 (citing 405 ILCS 5/1-107.1(d)(3)).) These medications could only be authorized if their benefits outweighed the harms and less restrictive services had been considered and found ineffective. (App. A-16 (citing 405 ILCS 5/2-107.1(d)(4), (d)(6)).)

Third, section 2-107.1 required a hearing before a trial judge. The court's intervention would ensure that the medication would be used for "therapeutic" rather than disciplinary or management purposes. (App. A-16) Further, the 90-day limitation on the treatment (405 ILCS 5/2-107.1(e)) "not only ensures that only those persons who actually lack the capacity to make reasoned decisions concerning psychotropic medication will have that decision made for them by the court as surrogate, it also ensures that persons who actually lack the capacity to make reasoned decisions concerning psychotropic medication will only be given such medication for the period of time it is most needed." (App. A-16–A-17)

In addition to these features of the statute, the supreme court also specifically responded to C.E.'s contention that the due process clause required a substituted judgment standard. (App. A-17–A-22) The court found that the recipient's wishes while competent "will often by [sic] very relevant to a determination of whether psychotropic substances should be administered under section 2-107.1." (App. A-21) However, the court also recognized that such evidence will sometimes not be available and that, in those instances, "an objective standard of reasonableness" would be sufficient. (App. A-19) By adopting this hybrid standard, "the court may preserve the integrity of the mental health patient while respecting the mental health professional's duty to treat the patient." (App. A-19)

Contrary to Petitioners' argument, this decision does not conflict with the decisions of this Court. In fact, Petitioners overstate the scope of this Court's rulings in *Cruzan* and *O'Connor v. Donaldson*, 422 U.S. 563 (1975), in asserting a claim of conflict.

Most recently, in *Cruzan*, this Court expressly cautioned that "in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.' " *Cruzan*, 497 U.S. at 277-78 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)). Consistent with this view, the Court held that Missouri could insist on a substituted judgment standard established by clear and convincing evidence before permitting a surrogate to withdraw hydration and nutrition for a person in a persistent vegetative state without offending the due process clause. 497 U.S. at 284. The Court made clear, however, that the issue before it was "simply and starkly whether the United States Constitution *prohibits* Missouri from choosing the rule of decision which

it did." *Id.* at 277 (emphasis added). It did not even purport to decide that such a standard was constitutionally *required.*

The Court nonetheless did not equate the rights of an incompetent person to refuse treatment with those of a competent person. Rather, it noted that such an argument "in a sense begs the question," *id.* at 280, because an incompetent person is unable to make such decisions. *Id.*

O'Connor likewise provides no support for Petitioners' claim of conflict. In that case, the Court merely decided that the due process clause prohibits a state from confining a non-dangerous mentally ill patient against his will for indefinite periods. 422 U.S. at 575. The Court expressly refused to resolve the issue whether the state may compulsorily confine such a person for purposes of treatment. *Id.* at 573.

Petitioners also paint with a broad brush in asserting that the decision below conflicts with the standard articulated by the Supreme Judicial Court of Massachusetts in *In the Matter of Guardianship of Roe,* 383 Mass. 415, 421 N.E.2d 40 (1981). While that court required the application of the substituted judgment standard before the involuntary administration of psychotropic medication, the procedures and factors to consider that the court cited in applying that standard are akin to those in section 2-107.1. For example, the court refused to allow the guardian to consent on behalf of the ward and designated the court as the decision-maker, just as section 2-107.1 does. *Id.* at 434, 421 N.E.2d at 51; 405 ILCS 5/2-107.1(a).

Further, in identifying the factors relevant to application of the substituted judgment standard, the court articulated a non-exclusive list, including the ward's expressed preferences regarding treatment, his religious beliefs, the

impact upon his family, the probability of adverse side effects, the consequences if treatment is refused, and the prognosis with treatment. 383 Mass. at 444, 421 N.E.2d at 57. Many of these factors correspond to the standards set by section 2-107.1, as interpreted by the Illinois Supreme Court. (App. A-19 (finding evidence of the recipient's wishes while competent relevant)); 405 ILCS 5/2-107.1(d)(2)-(4), (d)(6) (requiring a showing of deterioration of ability to function or threatening or disruptive behavior, sustained or repeated episodes of symptoms, benefits of medication outweigh harm, less restrictive services found inappropriate).

Upon close examination, then, Petitioners have not established that the decision reached by the Illinois Supreme Court to uphold section 2-107.1 on its face conflicts with the decisions of this Court or a decision of another state court of last resort. Sup. Ct. Rule 10.1(b). For this reason as well, review is not warranted, and this Court should deny the petition.

IV.

PETITIONERS HAVE NOT MET EVEN THE THRESHOLD OF ESTABLISHING AN EQUAL PROTECTION VIOLATION BECAUSE SECTION 2-107.1 SUBJECTS ALL DECISIONS REGARDING THE INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATIONS TO ITS PROVISIONS.

The flaw in Petitioners' equal protection argument is in its premise: They assume that persons for whom a court order is sought under section 2-107.1 is similarly situated, for equal protection purposes, to a person for whom guardianship is sought. (Petition at 25-26) The equal protection clause requires the state to treat similarly situated persons in a similar manner. *City of Cleburne v. Cle-*

burne Living Center, Inc., 473 U.S. 432, 439 (1985). The equal protection clause does not, however, deny a state the power to draw lines that treat different classes of persons differently. *Nordlinger v. Hahn*, ____ U.S. ____, 112 S. Ct. 2326, 2331 (1992). Thus, to establish an equal protection violation a person must show that a statute arbitrarily discriminates against that person by withholding some benefit or privilege the state gives to all others similarly situated. *Id.*

Significantly, section 2-107.1 does not draw a distinction between recipients of services who have guardians appointed and those who do not. Instead, the statute subjects all decisions involving the involuntary administration of psychotropic medications to the procedures and standards set forth therein. *See* P.A. 89-11, § 5 (Resp. App. A-2–A-3).

Moreover, the fact that persons subject to the involuntary administration of psychotropic medications under section 2-107.1 and persons subject to guardianship lack the capacity to make certain types of decisions is not determinative. The types and extent of the incapacities involved and the nature of the decisions distinguish these two classes of persons. The guardianship system is not designed to address the frequently transitory nature of the mental illnesses that require treatment with psychotropic medications. Many individuals who either are not, or have not been adjudicated, legally disabled may nonetheless lack the capacity, at least for limited periods of time, to make treatment decisions. Yet, for other purposes, and for other periods of time, those individuals may be capable of making decisions and thus not qualify under the standards for appointing a guardian.

The legislature is not prohibited from providing distinct procedures and standards for persons who are uniquely

situated and constitute a distinct category of persons from those adjudicated legally incompetent or from drawing classifications that rationally correspond to legitimate legislative purposes. *See Heller v. Doe*, ____ U.S. ____, 113 S. Ct. 2637 (1993). Therefore, Petitioners have not shown that section 2-107.1 deprives them of equal protection. There is no basis of error warranting this Court's review.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

PUBLIC ACT 89-11

AN ACT to amend the Mental Health and Developmental Disabilities Code by changing Section 2-107.1.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Mental Health and Developmental Disabilities Code is amended by changing Section 2-107.1 as follows:

(405 ILCS 5/2-107.1) (from Ch. 91 1/2, par. 2-107.1)

Sec. 2-107.1. Administration of psychotropic medication upon application to a court.

(a) Notwithstanding the provisions of Section 2-107 of this Act, psychotropic medication may be administered to a recipient of services against his will under the following standards ~~and procedures of this Section~~:

(1) ~~(a)~~ Any person 18 years of age or older, including any guardian, may petition the circuit court for an order authorizing the administration of psychotropic medication to a recipient of services.

(2) ~~(b)~~ The court shall hold a hearing within 30 days of the filing of the petition.

(3) ~~(c)~~ Unless otherwise provided herein, the procedures set forth in Article VIII of Chapter 3 of this Act, including the provisions regarding appointment of counsel, shall govern hearings held under this subsection (a) ~~Section~~.

(4) ~~(d)~~ Psychotropic medication shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present:

(A) ~~(1)~~ That the recipient has a serious mental illness or developmental disability.

(B) ~~(2)~~ That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.

(C) ~~(3)~~ That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) ~~paragraph (2) of subsection (d)~~ of this subdivision (4) ~~Section~~ or the repeated episodic occurrence of these symptoms.

(D) ~~(4)~~ That the benefits of the psychotropic medication will outweigh the harm.

(E) ~~(5)~~ That the recipient lacks the capacity to make a reasoned decision about the medication.

(F) ~~(6)~~ That other less restrictive services have been explored and found inappropriate.

(5) ~~(e)~~ In no event shall an order issued under this Section be effective for more than 90 days. However, psychotropic medication may be administered for additional 90-day periods without limitation under hearings that comply with the above standards and procedures of this subsection (a) ~~Section~~.

(6) ~~(f)~~ An order issued under this subsection (a) ~~Section~~ shall designate the persons authorized to administer the psychotropic medication under the standards and procedures of this subsection (a) ~~Section~~.

(b) ~~(g)~~ A guardian may ~~shall only~~ be authorized to consent to the administration of psychotropic medication to an objecting recipient only under the standards and procedures of subsection (a) ~~this Section~~.

(c) Notwithstanding any other provision of the Section, a guardian may consent to the administration of psychotropic medication to a non-objecting recipient under Article XIa of the Probate Act of 1975.

(d) ~~(h)~~ Nothing in this Section shall prevent the administration of psychotropic medication to recipients in an emergency under Section 2-107 of this Act.

(Source: P.A. 87-124.)

Section 99. Effective date. This Act takes effect upon becoming law.

President of the Senate

Speaker, House of Representatives

APPROVED

this 31st day of March 1995 A.D.

Jim Edgar

GOVERNOR